In the

United States Circuit Court of Appeals

For the Ninth Circuit 6

No. 8147

W. E. JAMES and AGNES JAMES,

Appellants,

vs.

O. A. NELSON, as an Individual, O. A. NELSON, as a Trustee, N. P. NELSON, CHARLES HAWKINS and CHARLES McMAHAN,

Appellees.

Upon Appeal From the United States District Court for the Territory of Alaska, Third Division

Honorable Simon Hellenthal, Judge

BRIEF OF APPELLANTS

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STATEMENT OF THE CASE

This litigation was instituted April 27, 1934, by a complaint in equity, filed by W. E. James and Agnes James, his wife, as Plaintiffs, against O. A. Nelson, individually and as Trustee, N. P. Nelson, Charles Hawkins, and Charles McMahan, as Defend-

ants, based upon fraud and misrepresentation of the Defendant, O. A. Nelson, to set aside a so-called "Deed and Bill of Sale," certain leases, and for an accounting.

Prior to April 11, 1933, Appellants, by right of discovery and location and by performance of annual labor, were the owners of and entitled to the possession of the following described placer mining claims, subject to the paramount title of the United States of America:

> "Those certain placer mining claims, situated upon Bonanza Creek, a tributary of Cathenda Creek; on Gold Run Creek, a tributary of Glacier Creek; on Cathenda Creek; and on Little Eldorado Creek, a tributary to Bonanza Creek; all of said claims being in the White River Mining District of the Chisana Recording District, Territory of Alaska, described as follows:
>
> Discovery of Bonanza Creek;
>
> No. 1 Above Discovery on Bonanza Creek;
> No. 5 Above Discovery on Bonanza Creek.
> No. 6 Above Discovery on Bonanza Crek;
> No. 14 Above Discovery on Bonanza Creek;
> No. 15 Above Discovery on Bonanza Creek;
>
> Discovery Fraction on Bonanza Creek;
>
> No. 5 Fraction Above Discovery on Bonanza Creek;
>
> Discovery on Gold Run Creek;
>
> Discovery Annex on Gold Run Creek;
>
> No. 1 Cathenda Creek;
> No. 1 Little Eldorado Creek;

No. 3 Little Eldorado Creek;
No. 1 Fraction Little Eldorado Creek;
No. 1 Gold Gug Bench on Little Eldorado Creek;

No. 2 Gold Bug Bench on Little Eldorado Creek;

No. 3 Gold Bug Bench on Little Eldorado Creek;

James Bench on Little Eldorado Creek."

On February 5, 1930, Appellants gave to the First Bank of Cordova a mortgage upon the above property to secure the payment of four promissory notes totaling $5,150, which mortgage was unpaid, and suit for forclosure was pending on April 11, 1933.

Appellants had also become indebted to the Chitina Cash Store of Chitina, Alaska, for goods purchased and monies advanced in the conduct of their mining operations. The Chitina Cash Store was an indorser upon certain of the promissory notes involved in the foreclosure suit. O. A. Nelson, one of the Appellees here, was at all times the owner of said store. Appellants were indebted to sundry other persons also.

On March 3, 1933, acting for the Bank and the Chitina Cash Store, Donohoe & Donohoe, attorneys, wrote Appellants as follows:

> "They have authorized me to state that if you will give a conveyance of the property such as a deed so that they may have control of its opera-

> tion, and may make such arrangements as they desire to realize some part of the money they have coming, they will apply all amounts received upon your indebtedness until it is liquidated, and then return the property to you."

On March 9, 1933, Appellants, in answer, requested that O. A. Nelson be sent to Chitina so "that we can make a deal along the line you mention in your letter, as I do not want to put anything in your way to delay paying them or the bank up."

O. A. Nelson came to Chisana. Negotiations were begun. Appellants refused to sign unless the Bank's indebtedness, the indebtedness to the Cash Store, and all their other bills, were paid. Nelson was handed an itemized list of their creditors, and two of their creditors personally presented their bill to him. He offered to submit the proposition to the Bank. At that point, an instrument designated as a "Deed and Bill of Sale" was entered into between W. E. James and Agnes James, husband and wife, and O. A. Nelson, Trustee, covering the mining claims above described, which instrument is herein set out (Tr. 104), following:

"Deed and Bill of Sale

> "This indenture, made this 11th day of April, 1933, between W. E. James and Agnes James, husband and wife, of Chisana, Alaska, the parties of the first part, and O. A. Nelson,

Trustee, of Chisana, Alaska, the party of the second part, witnesseth:

"The said parties of the first part, for and in consideration of the sum of $1.00 and other good and valuable consideration by them received, do by these presents grant, bargain, sell, convey and confirm unto the said party of the second part, and to his heirs and assigns, the following described property:

"Placer mining claims, Discovery on Bonanza Creek, No. 1 above Discovery on Bonanza Creek, No. 5 above Discovery on Bonanza Creek, No. 6 above Discovery on Bonanza Creek, No. 14 above Discovery on Bonanza Creek, No. 15 above Discovery on Bonanza Creek, Discovery Fraction on Bonanza Creek, No. 5 Fraction above Discovery on Bonanza Creek, Discovery on Gold Run Creek, Discovery Annex on Gold Run Creek, No. 1 Cathenda Creek, No. 1 Little Eldorado Creek, No. 3 Little Eldorado Creek, Discovery Bench on Little Eldorado Creek, No. 1 Discovery Bench on Little Eldorado Creek, No. 2 Discovery Bench on Little Eldorado Creek, No. 3 Discovery Bench on Little Eldorado Creek; No. 1 Fraction on Little Eldorado Creek; No. 1 Gold Bug Bench on Little Eldorado Creek; No. 2 Gold Bug Bench on Little Eldorado Creek; No. 3 Gold Bug Bench on Little Eldorado Creek; and James Bench on Little Eldorado Creek; all situated on Gold Run and Bonanza Creeks and tributaries, in the White River Mining District of the Chitina Recording Precinct, Third Division, Territory of Alaska; and also together with a sawmill and cabin located near the postoffice in the town of Chitina, Alaska, and one large cabin located in the town of Chitina and known as the James Cabin; and also together with all houses, buildings, pipe, giants, flumes, tools, machinery and equipment of every kind and

nature upon the said mentioned properties, or any of them, or in any manner connected therewith.

"To have and to hold the same, together with the dips, angles, spurs, ores, minerals, tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining, forever.

"The said parties of the first part, their heirs, executors and administrators do by these presents covenant, grant and agree to and with the said party of the second part, his heirs and assigns, that they, the said parties of the first part, their heirs, executors and administrators, all and singular, the premises hereinabove conveyed, described and granted, or mentioned, with the appurtenances, unto the said party of the second part, his heirs and assigns, and against all and every person or persons whomsoever lawfully claiming or to claim the same or any part thereof shall and will warrant and forever defend.

"In witness whereof the said parties of the first part have hereunto set their hands and seals the day and year first above written.

"W. E. JAMES (Seal)
"AGNES JAMES (Seal)

"Signed, sealed and delivered in the presence of

"LUELLA JOHNSTON
"C. H. GILLAM."

The instrument was not acknowledged, and the last named witness, C. H. Gillam, was not present at the time the instrument was signed. He signed later. (Tr. 106-114.)

Nelson left with the instrument. Still unsettled as to their agreement, he wrote Appellants April 13, 1933, stating (Tr. 90):

> "The bank's first proposal was that they held the ground in trust till the debts were paid and then return the ground to you, but any unexpired leases that the bank might give would hold until they expired. I understood that you preferred to give up all claim to the ground for all time with the understanding that you get the lease for a year on a plot of ground selected by yourself, 100 by 100 feet, on Bonanza Creek at the mouth of Little Eldorado, and also that the Bank of Cordova and the Chitina Cash Store would accept the bill of sale for the ground as full and final satisfaction for the amounts you owe the two institutions.
>
> "I do not want any possibility for a misunderstanding and if this is the way you intended the matter to stand, I wish you would write a note on the bottom of this page to that effect and sign it. . . . "

On April 16, 1933, Appellants replied, saying (Tr. 92):

> "I prefer to the proposition of your cleaning up all my indebtedness in First Bank of Cordova and Chitina Cash Store by deed for all time, returning me notes and receipts paid in full . . . "

But, in the meantime, while still appearing to seek a definite understanding and before the letter of April 16 had been received, O. A. Nelson caused the "Deed and Bill of Sale" to be recorded in Chitina Recording Precinct, Chitina, Alaska, with O. A. Nel-

son, himself, as Commissioner and Ex-Officio Recorder for the Chitina Recording Precinct, Third Division, Territory of Alaska.

No acknowledgement appeared on the instrument of record.

On April 17, 1933, O. A. Nelson, acting for himself and in his individual capacity, gave to N. P. Nelson, one of the Appellees herein, a purported Lease of certain mining claims covered by the "Deed and Bill of Sale," for a term to expire on October 1, 1942, providing as consideration therefor "that from the gold extracted from said property he will pay to the said first party (O. A. Nelson) as royalty ten (10%) per cent of the gross amount of gold . . ." (Tr. 127.)

The purported Lease from O. A. Nelson to N. P. Nelson was not acknowledged. (Tr. 130.)

At later dates, O. A. Nelson gave Leases to the Appellees, Charles Hawkins and Charles McMahan, which leases have expired or have been surrendered.

Not having heard from O. A. Nelson since April 13, 1933, Appellant James wrote him on May 16, 1933, asking for a copy of the "deed" made to the First Bank of Cordova, and asking that all notes and receipts in full from First Bank of Cordova and Chitina Cash Store be sent to him.

He received no reply. Appellants had no knowledge of the lease to N. P. Nelson, and heard no further word from O. A. Nelson until June 30, 1933, when O. A. Nelson wrote (Tr. 93):

> " * * * When I was down at Cordova about the first of May I took up the matter of your deed with Muller. I told him that you would prefer to make it an unconditional sale with nothing coming to you at any time in the future, and have the mortgage satisfied. But Muller (First Bank of Cordova) does not want to drop the mortgage unless the C. C. S. (Chitina Cash Store) will take over the proposition and assume the debt owing to the bank. We would do this if we were in a condition where we could, but at the present the matter will have to stand just as we agreed when I was in there. N. P. Nelson has a lease on part of the ground, and the royalty from his lease and any other leases will go to pay off the mortgages. When these are paid, then the royalties will go to you. Probably you have as good an idea as I have how long that will be. If we find later that we can afford to take up the indebtedness to the Bank, then we will have the mortgage satisfied and you will be relieved of all responsibility for the indebtedness. . . ."

On the same day as the letter was dated, O. A. Nelson came upon the mining property and conversed with Appellants. Appellant James objected that he was being doublecrossed. Nelson walked away without replying. It was evident from his letter that O. A. Nelson was trying to have his cake and eat it, too.

Appellants continued to occupy the mining claims and to hold possession of same and of the personal property. (Tr. 101, 113.) N. P. Nelson never worked the mining claims covered by his purported Lease during the year 1933, or until the Spring of 1934, after the present litigation was begun. (Tr. 112-118.) He worked upon claims of other parties above the James property, performing dead work, stating to James that he was a laborer for O. A. Nelson, and securing permission to use a cabin on the James property in which to live and another in which to store gasoline. (Tr. 113-119.)

Appellants became uneasy and suspicious because the deed had not been returned and because there was general talk that O. A. Nelson and N. P. Nelson were going to operate their property.

Obtaining no satisfaction from O. A. Nelson, James again wrote the Bank under date of September 15, 1933, asking "why all this was going on, why his deed had not been sent back" to him. (Tr. 94.)

The Bank answered (Tr. 95) that O. A. Nelson held the notes, and the mortgage had been assigned to him; and that Appellants would have to look to Nelson.

James immediately wrote Nelson, and, under date of October 12, 1933, Nelson answered, for the first

time disclosing himself in his true light, in part as follows (Tr. 96-97):

> "The deed and bill of sale was an outright and complete transfer of title, but at the time we considered both the propositions of returning the property to you, if and when the indebtedness had been paid, and of making the transfer permanent. I have a signed statement from you in which you say that you prefer to make the sale permanent on condition that the mortgage be cancelled and the notes returned to you. you.
>
> "I now hold the mortgage and notes and they are a valid lien against any property you have until they are satisfied or returned to you and discharged.
>
> "N. P. Nelson has possession of all of this property and you are hereby authorized to turn over to him all of the property named and described in the bill of sale. I am sending him a copy of this letter with instructions to receive this property and to check up thoroughly on the same, which he is in a position to do, as he knows what was on the ground at the time the mortgage was made.
>
> "As soon as I receive word from N. P. that you have turned over all of the property covered by the deed and bill of sale, and have vacated the ground completely, and have met all of the terms of the above named deed and bill of sale, then I will send you the notes named therein and will send you the mortgage with the endorsement that it has been fully satisfied. . . ."

Appellants replied on October 18, 1933, reiterating their original proposition and asserting that they did

not consider the deed valid, since their proposition was not accepted. (Tr. 99.) Shortly thereafter, O. A. Nelson wrote Appellants, ordering them off the property, and sent certain papers, purporting to be the canceled notes, to Appellants by N. P. Nelson, which they refused to accept (Tr. 100), and this litigation ensued.

By October of 1933, and prior to the time N. P. Nelson had performed any work on the claims covered by his purported lease, Appellants had posted notices of ownership and forbidding trespassing on all of the claims owned by them. (Tr. 112-118.)

After suit was brought in April, 1934, N. P. Nelson went upon the property covered by his purported lease, and extracted $9,000 in gold recoveries therefrom. (Tr. 134.) He employed a crew of six men, and expended $16,540. He was entirely without funds or property himself, and was unable to purchase the necessary supplies and equipment to mine the property. O. A. Nelson put up the money. (Tr. 141.)

According to the undisputed testimony of Appellants, the reasonable value of the mining property involved in the Deed and Bill of Sale was $150,000. (Tr. 101.)

The Appellees, defending separately, denied fraud or misrepresentation, and affirmatively pleaded that at all times there was a clear understanding between the parties, and that Appellees, N. P. Nelson, Charles Hawkins and Charles McMahan, entered into possession of the ground with the full knowledge and consent of Appellants. (Tr. 37-46-57-65.)

* * * *

Following the testimony of all the litigating parties, oral argument and presentation of memoranda of authorities, the trial judge filed his written opinion, in which he ruled that there had been no meeting of minds between Appellants and the Appellee, O. A. Nelson, and the First Bank of Cordova; but that Appellants by their acts and conduct were estopped to deny the lease from O. A. Nelson to the Appellee, N. P. Nelson.

In conformity with this conclusion, the trial judge, after refusing proposed Findings of Fact and Conclusions of Law of Appellants (Tr. 147) and allowing exception thereto, on March 13, 1935, made and entered its Findings of Fact and Conclusions of Law and Decree, which adjudged as follows:

1. That the "Deed and Bill of Sale" from W. E. James and Agnes James, his wife, to O. A. Nelson, Trustee, be set aside, canceled and annulled.

2. That Appellants are estopped to deny the validity of the Lease from O. A. Nelson to N. P. Nelson.

3. That the rights under the N. P. Nelson lease henceforth shall accrue to Appellants.

4. That the leases given by O. A. Nelson to Charles Hawkins and Charles McMahan, the remaining Appellees herein, are of no further force and effect.

5. That no costs, attorney's fees or disbursements be recovered by any of the litigating parties. (Tr. 160.)

Thereafter, upon petition for rehearing and oral argument of attorneys for all parties, the trial judge on November 9, 1935, made his Supplemental and Final Decree, allowing Appellants and O. A. Nelson an exception, in which he adjudged:

1. That Appellee, N. P. Nelson, shall make and deliver a report in writing to Appellants showing the gross amount of gold extracted during each mining season for the term of the lease, and deliver duplicate receipts of all mint or smelter returns and receipts of banks evidencing the gold recoveries. (Tr. 183.)

Thereafter, on January 20, 1936, this appeal, being launched by notice of appeal filed with approved

cost bond, was allowed and approved by order of Court. (Tr. 199-203.)

* * * *

This appeal involves the question:

Can the doctrine of estoppel be invoked under the facts and circumstances of this case to deny Appellants the right to question the validity of the lease of April 17, 1933, given by O. A. Nelson to N. P. Nelson?

ASSIGNMENTS OF ERROR.

Appellants, on January 7, 1936, filed assignments of error (Tr. 195-196-197-198-199), as follows:

I. The Court erred in invoking the doctrine of estoppel against the Plaintiffs with reference to the lease given by Defendant O. A. Nelson to Defendant N. P. Nelson on April 17, 1933, upon the ground that the Plaintiffs did no acts, committed no fraud, made no representations, nor created no condition upon which the doctrine of estoppel could be lawfully predicated.

II. The Court erred in invoking the doctrine of estoppel against the plaintiffs with reference to the lease given by Defendant O. A. Nelson to Defendant N. P. Nelson on April 17, 1933, upon the ground that the essential elements of

estoppel were wholly lacking, as shown by the testimony of both the Plaintiffs and Defendants herein.

III. The Court erred in invoking the doctrine of estoppel against the Plaintiffs with reference to lease given by Defendant O. A. Nelson to Defendant N. P. Nelson on April 17, 1933, upon the ground that the same had not been pleaded by the Defendant N. P. Nelson, and he did not sustain the burden of proof with reference thereto.

IV. The Court erred in refusing to cancel and set aside the lease from Defendant O. A. Nelson to Defendant N. P. Nelson dated April 17, 1933, on the ground that the same was fictitious, the royalties grossly inadequate, the terms burdensome and contrary to public policy.

V. The Court erred in refusing to cancel and set aside the lease from Defendant O. A. Nelson to Defendant N. P. Nelson, dated April 17, 1933, on the ground that the same was unacknowledged, unwitnessed, unrecorded, and constituted a cloud upon the title of Plaintiffs.

VI. The Court erred in refusing to cancel and set aside the lease from Defendant O. A. Nelson to Defendant N. P. Nelson, dated April 17, 1933,

on the ground that the Deed and Bill of Sale from Plaintiffs to Defendant O. A. Nelson, as recorded, constitute no notice, constructive or otherwise, to Defendant N. P. Nelson, evidencing any right or authority on the part of Defendant O. A. Nelson to lease the property covered by said lease to Defendant N. P. Nelson dated April 17, 1933.

VII. The Court erred in refusing to grant the Plaintiffs an accounting from the Defendants, and each of them, as prayed for in their complaint, upon the ground that the Deed and Bill of Sale theretofore given to Defendant O. A. Nelson being void and set aside, all recoveries under such void lease became the property of Plaintiffs and they were immediately entitled to same.

VIII. The Court erred in finding that Defendant O. A. Nelson acted as trustee and agent for the Plaintiffs in making the lease to Defendant N. P. Nelson, the trial Court having already determined that the Deed and Bill of Sale, purporting to confer authority upon Defendant O. A. Nelson as trustee, was void and of no effect.

IX. The Court erred in its failure to make and adopt the Findings of Fact proposed by

Plaintiffs designated in respect to holding the said lease to the Defendant N. P. Nelson as invalid, and in respect that the Plaintiffs never authorized the execution and delivery of said purported lease and never ratified the same; and that prior to the time when the Defendant N. P. Nelson took possession of the property under said purported lease Plaintiffs had notices posted upon such property declaring Plaintiffs' ownership thereof, and warning trespassers to keep off, upon the ground that the evidence submitted will sustain no other conclusion.

X. The Court erred in failing to adopt and make of the proposed Conclusions of Law presented by Plaintiffs, the Second thereof, to the effect that the Plaintiffs are entitled to a decree canceling and setting aside a certain lease made and executed by Defendant O. A. Nelson as lessor to the Defendant N. P. Nelson as lessee, bearing date April 17, 1933, expiring October 1, 1942, covering certain mining claims and property described therein.

XI. The Court erred in making and rendering a supplemental and final decree in this cause on the 9th day of November, 1935, with respect to that certain part of said supplemental

and final decree wherein said decree determines that the Defendant O. A. Nelson acted as trustee and agent for the Plaintiffs in making a certain lease dated April 17, 1933, to the Defendant N. P. Nelson as lessee, and insofar as said decree holds that the Plaintiffs are estopped from denying the validity of such lease.

SPECIFICATIONS OF ERROR

I.

The Court erred in invoking the doctrine of estoppel against the Appellants, with reference to the Lease given by O. A. Nelson to N. P. Nelson dated April 17, 1933. (Tr. 195-196, Assignments I, II, III.)

II.

The Court erred in refusing to cancel and set aside the Lease from O. A. Nelson to N. P. Nelson dated April 17, 1933. (Tr. 196-197, Assignments IV, V, VI, VIII, XI.)

III.

The Court erred in refusing to grant to Appellants an accounting, as prayed for in their complaint. (Tr. 197, Assignment VII.)

IV.

The Court erred in refusing to adopt and make the proposed Findings of Fact and Conclusions of Law submitted by Appellants. (Tr. 198, Assignments IX, X.)

ARGUMENT

Examination of the Assignments of Error verifies the previous assertion that this appeal presents only one question—and that a mixed question law and fact. Unfortunately, its consideration is somewhat complicated by a dispute as to the facts.

For clarity and convenience, the question involved may be split in two:

First, What record notice, if any, was imparted to N. P. Nelson, the lessee, upon which the doctrine of estoppel can be invoked against Appellants?

Second, What acts or conduct, founded in fraud, misled the said N. P. Nelson to his damage, upon which the doctrine of estoppel can be invoked against Appellants?

The Law Does Not Favor Estoppels.

It has been said that estoppel is the spirit extract of fraud, and that the doctrine upon which it rests fastens and feeds upon the element of fraud. It is clothed in wrongdoing, and carries the badge of overreaching. Because of its significance, estoppels are not favored, and should not be applied to any case where the facts do not clearly justify their application.

10 R. C. L., 688-690.
Sanford, etc., v. Com'r, etc., 35 Fed. (2d) 312.
Burlington v. Rockwell, 31 Fed. (2d) 27.
Holbrook, etc., v. Arkansas, etc., 42 Fed. (2d) 541.
Rockwell v. U. S., 39 Fed. (2d) 984.
Miller v. Hayman, 52 Fed. (2d) 188.
In re: *Bastanchury Corp.*, 66 Fed. (2d) 665.
Starrett Corp. v. Fifth Ave., etc., 1 Fed. Sup. 868.
Burlew v. Fidelity, etc., 64 Fed. (2d) 976.

(1) Estoppel Must Be Pleaded

The defense of estoppel must be pleaded. It is an affirmative defense, and the complainant is entitled to notice before trial.

In 10 R. C. L., 842, it is said:

> "It has also been held that an estoppel *in pais* must be pleaded in equity but need not be pleaded at law. The general rule now obtaining, however, is that estoppels, to be available on the trial, must be specially pleaded where there has been an opportunity for so doing; and that if a party, who has an opportunity to plead an estoppel upon which he relies, fails to do so, and goes to issue on his opponent's pleading, he thereby waives the estoppel and puts the matter at large."

To like effect is the rule as laid down in 21 Corpus Juris, 1243, where we find:

> "While there is some authority to the contrary, the weight of authority is that, where there is opportunity to do so, an estoppel by deed must be specially pleaded to be availed of; and this is also the rule in respect of estoppels by record."

Here, the Appellee, N. P. Nelson, had every opportunity upon which to base a plea of estoppel. Yet, not one word was pleaded, and not once in oral argument or the presentation of authorities was the question raised. There could not have been a waiver of the rule by the Appellants, for the defense had not been raised. It was actually raised for the first time by the judge himself when he rendered his decision.

(2) Burden of Proof Is Upon One Asserting Estoppel

It is a well settled rule of evidence that the burden of proof is upon him who has the affirmative of the issue. The burden of proof is upon the party alleging and relying upon an estoppel to establish all the facts necessary to constitute it.

> 21 Corpus Juris, 1250-1251.
>
> *Anderson v. Missouri State, etc.*, 69 Fed, (2d) 794.

In 10 R. C. L., 845, it is said:

> "The burden of proof rests on the party setting up an estoppel to show the grounds on which it rests, and, as a pleading in estoppel should be certain in every particular and leave nothing to mere inference or intendment, so the evidence to support it must be clear, precise, and unequivocal. So, where an estoppel *in pais* is sought to be established by evidence of the declarations and admissions of persons made long anterior to the trial, such evidence cannot be too carefully scrutinized by the court or jury. It has been declared to be the most dangerous species of evidence that can be admitted in a court of justice and most liable to abuse."

The burden of proving that the Appellants had so acted and conducted themselves as to be estopped from denying the validity of the Lease, under the authorities, rested upon N. P. Nelson. Measured by the evidence, he neither accepted the burden, nor did he offer evidence to sustain it.

Estoppel Cannot Be Invoked From the Record

The deed and bill of sale given by Appellants to O. A. Nelson, Trustee, was the only evidence of title which O. A. Nelson had upon which to base the Lease given him April 17, 1933, to N. P. Nelson. That instrument contained no acknowledgement, and only one witness was present when it was signed.

The statutes of Alaska Territory pertinent thereto are as follows:

> "Sec. 2818. Deeds executed in Territory; two witnesses; acknowledgement. Deeds executed within the Territory of lands or any interest in lands therein shall be executed in the presence of two witnesses, who shall subscribe their names to the same as such; and the persons executing such deeds may acknowledge the execution thereof before any judge, clerk of the District Court, notary public, or commissioner within the Territory, and the officer taking such acknowledgment shall indorse thereon a certificate of acknowledgment thereof and the true date of making the same under his hand."
>
> "Sec. 2833. Deed proved may be read in evidence; recording. Every conveyance acknowledged or proved or certified in the manner hereinbefore prescribed by any of the officers before named may be read in evidence without further proof thereof, and shall be entitled to be recorded in the precinct in which the lands lie."
>
> Compiled Laws of Alaska, 1933.

Under the clear words of the Alaska statutes, the so-called deed and bill of sale given by the James' to O. A. Nelson was not entitled to record. Hence, it gave no constructive notice to N. P. Nelson, a subsequent purchaser of an interest therein.

The general rule is aptly stated in American Law Reports, Annotated, 19 A. L. R. 1974, as follows:

> "Where an instrument is required by statute to be acknowledged before being admitted to record, and the acknowledgment is omitted or is so defective that the instrument is not entitled to record, if it is nevertheless admitted to record, the record is not constructive notice."

So, also, is the rule laid down in 1 R. C. L. 263, Sec. 26, as follows:

> "And inasmuch as the recording of an unacknowledged instrument is not provided for by the statutes in question, the mere fact that the instrument may have been copied in the book of records is deemed by the weight of authority not to operate as constructive notice of its existence to subsequent purchasers or to anyone else. The certificate of acknowledgment is a necessary part of the record, and its omission renders the registration of the instrument a nullity for the purpose of charging any one with constructive notice."

Taylor v. Harrison, 47 Tex. 454, 26 Am. Rep. 304 (note).

Main v. Alexander, 9 Ark. 112; 47 Am. Dec. 732, 734.

Wolf v. Fogerty, 6 Cal. 224, 65 Am. Dec. 509.

Herndon v. Doe, 7 Ga. 432, 50 Am. Dec. 406 (note).

Choteau v. Jones, 11 Ill. 300, 50 Am. Dec. 460.

Nordman v. Rau, 86 Kan. 19; 119 Pac. 351, 38 L. R. A. (N. S.) 400.

Bishop v. Schneider, 46 Mo. 472, 2 Am. Rep. 538.

Hayden v. Moffatt, 74 Tex. 647, 12 S. W. 820, 15 A. S. R. 869.

To the same effect is the rule laid down in 1 Corpus Juris, 757, Sec. 19, as follows:

> "Where the statute prescribed acknowledgment as a prerequisite to registration, the recording of an unacknowledged instrument will not confer the benefits enjoyed by a properly recorded instrument, and will not operate as constructive notice to any one. . . . "

To the same effect is the decision of the Court in *Troyer v. Munday*, 60 Fed. (2d) 818, as follows:

> "The filing and recording of a mortgage is not constructive notice to a trustee in bankruptcy, unless there has been a substantial compliance with the requirements of the state statute as to acknowledgment."

Upon this question, we are not without precedent laid down by your honorable body.

The case of *Eadie v. Chambers* (1909), 172 Fed. 73, 18 Ann. Cas. 1906, 24 L. R. A. (N. S.) 879, is an Alaska case, construing the territorial recording

statutes, and was decided by this Court. While the question involved was the validity of a deed attested by only one witness, the same principle as laid down with reference to other requirements of the recording statutes is involved. In this case, this Court held that the formalities of the statute must be followed to entitle the instrument to record, although such an instrument might be valid as between the parties themselves.

Applying the general rule in a case tried before your honorable body, *Alaska Exploration Co. v. Northern Mining & Trading Co.*, 152 Fed. 145, this Court further said:

> ". . . in order for such a record to impart constructive notice to any one, it is essential that the instrument be entitled, under the law, to such recordation. 13 Cyc. 600; Alabama Marble & S. Co. v. Chattanooga Marble & S. Co. (Tenn Ch. App.), 37 S. W. 1009; Edwards v. Thom, 5 South. 707, 25 Fla. 222; Keech v. Enriquez, 10 South. 91, 28 Fla. 597.
>
> "It is clear that the certified copy of the record of the recorder of the mining district offered in evidence by the plaintiff in error did not meet these statutory requirements, for it showed upon its face that the deed that was recorded was without acknowledgment or other proof of its execution, and without the signature of subscribing witnesses. It was therefore not entitled under the law to be recorded anywhere, and the mere transcription of the unauthorized paper in the record of the mining district was not constructive notice to any one."

Hence, it is clear that the James deed to O. A. Nelson, not being acknowledged and not being properly witnessed, was not entitled to record, and the record made by this same O. A. Nelson, as Recorder, constituted no notice to N. P. Nelson of any right, title, or interest in O. A. Nelson to the mining property of Appellants.

If, however, under any supposition of facts, it might be claimed that said instrument gave any evidence of title upon which N. P. Nelson had a right to rely, the recital in the deed and bill of sale designating the grantee as "O. A. Nelson, trustee," was sufficiently limiting as to O. A. Nelson's ownership to put N. P. Nelson on guard in his dealings with him and to strip him of innocence and *bona fides* in his subsequent dealings with O. A. Nelson.

Estoppel Cannot Be Invoked From the Acts and Conduct of Appellants

To constitute an estoppel of the nature determined by the trial court, the elements of estoppel *in pais* must be present.

In Bigelow on Estoppel, at page 437, it is said:

> "The following elements must be present in order to constitute an estoppel by conduct:
>
> 1. There must have been a representation or concealment of material facts.

"2. The representations must have been made with the knowledge of the facts.

"3. The party to whom it is made must have been ignorant of the truth of the matter.

"4. It must have been made with the intention that the other party would act upon it.

"5. The other party must have been induced to act upon it."

Continuing, Bigelow states that an estoppel of this nature is such as arises "from the acts and declarations of a person by which he designedly induces another to alter his position injuriously to himself." Citations follow.

In Bouvier's Law Dictionary (Rawles 3rd Revision), Vol. 1, Estoppel by Matter *in Pais*, it is said:

"Equitable estoppel, or estoppel by conduct, is said to have its foundation in fraud, considered in its most general sense."

In 10 R. C. L. 688-690, we find the general rule as follows:

"Actual fraud will work an estoppel in almost every case, though it is not generally considered an essential element. So-called constructive fraud, however, is not only sufficient, but lies beneath every equitable estoppel; that is to say, the person estopped is considered as having by his admissions, declarations, or conduct, misled another to his prejudice, so that it would work a fraud to allow the true state of facts to be proved."

In Story's Equity, Vol. 1, 391, it is stated:

> "In all this class of cases the doctrine proceeds upon the ground of constructive fraud or concealment or negligence so gross as to amount to constructive fraud."

In *Anfenson v. Banks*, 163 N. W. (Iowa) 608, the Court said:

> "Generally speaking, an estoppel *in pais* is applicable only where the conduct or words of the party estopped are intended or are of such character that, under the circumstances shown, they will be presumed to have been intended to influence the other party to act thereon, and did in fact so influence him."

In *Garretson v. Association*, 13 Iowa 411, 61 N. W. 955, the Court said:

> "The doctrine of estoppel *in pais* is based upon a fraudulent purpose or fraudulent result. If the element of fraud is wanting, there is no estoppel, as where both parties were equally cognizant of the facts, and the declarations or silence of the one party produced no change in the conduct of the other. There must be deception and change of conduct in consequence."

See also

Wishard v. McNeill, 85 Iowa 479, 52 N. W. 486.

Beechley v. Beechley, 134 Iowa 82, 108 N. W. 765.

In 16 Cyc. 782, we find

> ". . . They (estoppels) are entitled to a fair and liberal application like other equitable doctrines that are admitted to suppress fraud and promote honesty and fair dealing."

The doctrine of estoppel, when applied, should be only to the extent of protecting the party who has been misled against the loss actually occasioned thereby. (Page 784.)

Estoppel is based upon a wrong.

Sanford, etc., v. Com'r, etc., 35 Fed. (2d) 312.

In Re Steiners' Improved Dye Works, 44 Fed. (2d) 531.

To work an estoppel, acts and declarations need not be made with intent to mislead, it being sufficient if they were calculated to and did mislead.

Trumbull v. Kirschbraun, 67 Fed. (2d) 974.

U. S. v. San Francisco, etc., 69 Fed. (2d) 728.

Mahoning, etc., v. U. S., 3 Fed Supp. 622.

Daube v. U. S., 5 Fed. Supp. 769.

"Conduct or statements calculated to mislead a party, and which are acted on by him in good faith to his prejudice, can only be invoked as a basis of estoppel."

State of Oklahoma v. State of Texas, 268 U. S. 252.

Mere silence is not sufficient to constitute an estoppel. There must be such silence that the one invoking the doctrine did not have equal knowledge with the other who failed to speak.

Detroit v. Detroit, 6 Fed. (2d) 845.

Clark v. Fisher, 8 Fed. (2d) 588.

Where conditions are known to all parties, or both have the same means of ascertaining the truth, and where they are under duty to ascertain the truth, there can be no estoppel. Estoppel is available for protection only, and cannot be used as a weapon of assault.

Murphy v. Payne, 15 Fed. (2d) 570.

Essential elements of estoppel *in pais* are ignorance of the party claiming estoppel of the matter involved, silence concerning the matter, and duty to speak, action on the apparent situation, and resulting damage, if estoppel is denied.

California Prune & Apricot Growers v. El Reno, etc., 15 Fed. (2d) 839.

Turk v. Newark Fire Ins. Co., 4 Fed. (2d) 142, also 6 Fed. (2d) 533.

From a collection of all the authorities, the rule is laid down in 10 R. C. L. 692-694, as follows:

> "Mere silence will not work an estoppel. There must be some other element connected with the transaction and the silence to prevent a person from asserting his rights or claim. . . .
>
> "The silence must be under such circumstances that there are both a specific opportunity, and a real or apparent duty, to speak. . . . But to effect an estoppel by silence it must also appear that the person had a full knowledge of the facts and of his rights, that he had an intent to mislead, or at least a willingness that others should be deceived, and that the other party was

misled by his attitude. And where the foundation for a claimed estoppel is silence or omission to give notice of one's rights, the party relying thereon must not have had the means of knowing the true state of facts, as by reference to the public records. . . . "

Continuing on page 697-698, we quote:

"The final element of an equitable estoppel is that the person claiming it must have been misled into such action that he will suffer injury if the estoppel is not declared. . . . the estoppel should be limited to what may be necessary to put the parties in the same relative position which they would have occupied if the predicate of the estoppel had never existed."

In 16 Cyc. 759, it is said:

"The Court says that to make silence of the party operate as an estoppel, the circumstances must have been such as to render it his duty to speak. It is essential that he should have had knowledge of the facts, and that the adverse party should have been ignorant of the truth, and have been misled into doing that which he would not have done but for such silence.

"Where a person stands by and sees another about to commit or in the course of committing an act infringing upon his rights and fails to assert his title or right, he will be estopped afterward to assert it; but it must appear that it was his duty to speak, and that his silence or passive conduct misled the other to his prejudice." (p. 761.)

To invoke the doctrine of estoppel, there must have been a waiver of the rights of the party against whom the doctrine is applied. To constitute a waiver of

one's rights there must be an intention to relinquish a known right.

Marsden v. Travelers, etc., 52 Fed. (2d) 75.

Oelbermann v. Toyo Kisen Kabushiki Kaisha, 3 Fed. (2d) 5.

Third Dec. Dig., Vol. 11, p. 1340.

Mere passive acquiescence does not generally raise estoppel.

Holbrook v. Arkansas, 42 Fed. (2d) 541.

Waiver involves clear, unequivocal and decisive acts of the party, or acts amounting to estoppel.

Victor, etc., v. Yates, 54 Fed. (2d) 1062.

Such intention to relinquish must be conveyed to the person who invokes the estoppel.

Oliver, etc., v. U. S., 20 Fed. (2d) 214.

An essential element of estoppel must be knowledge of one's own rights; otherwise acquiescence or assent are ineffctive.

In re Lake Champlain, etc., 20 Fed. (2d) 425.

Dickerson v. Colgrove, 100 U. S. 578.

Equally essential is the necessity of showing damage. To create estoppel *in pais*, one party must have been induced to change his position to his detriment; and it can be asserted only by one acting to his prejudice on a false statement made by the person against whom the doctrine is invoked.

U. S. Shipping, etc., v. Galveston, 13 Fed. (2d) 607.

In re Lake Champlain, etc., 20 Fed. (2d) 425.

"It has been held, however, that while an owner who fails to object to the erection of improvements upon his land may be estopped to claim the improvements, the principle cannot be carried to the extent of estopping him to claim title to the land in an action at law."

16 Cyc. 761.

From the foregoing well established rules, the necessary elements of estoppel may be summarized as follows:

There must have been a waiver of known rights; there must have been a silence when there was the duty to speak; there must have been fraud or constructive fraud; there must have been wrongdoing; there must have been concealment; there must have been knowledge on the part of the one and ignorance on the part of the other; there must have been an intent to induce the other party to act to his detriment; there must have been an intent to mislead; there must have been unequal knowledge or opportunity to know the facts; there must have been knowledge of his own rights on the part of the one against whom the doctrine is invoked; there must have been resultant injury or damage.

Measured by these well known principles, now let us examine the facts and circumstances surrounding the Appellants and N. P. Nelson with reference to the property involved in the lease given him by O. A. Nelson.

In making this examination, it appears proper to call attention to the very apparent confusion and inconsistency of the lower court's findings and conclusions. The court held that Appellants were estopped to deny the validity of the lease, and based his conclusion upon the following two inconsistent findings:

> "VI. That thereupon the defendant N. P. Nelson entered into possession of the mining claims above described (in the lease) *with the full knowledge and consent of the plaintiffs herein*, and spent large amounts of money in bringing water to said claims and developing said claims, and ever since said date has been and now is in lawful and peaceful possession thereof." (Tr. 170.)
>
> "VII. That on the 30th day of June, 1933, the defendant O. A. Nelson, acting for himself and associates, notified the plaintiff W. E. James that he would not at that time be able to go on with the proposition in connection with which the deed had been given, *and left the matter open for further negotiations; that the terms of this agreement in connection with which said deed was given were never fully agreed upon between the parties, and later in the Fall of 1933 the arrangement was definitely rejected by the plaintiffs.*" (Tr. 171.)

Bearing in mind the well established rule that Appellants must have known their own rights to be estopped, how could they have had knowledge or given consent to N. P. Nelson, when as the lower court rightly decided, there was never an agreement between the parties establishing their rights, so that they, in turn, could have knowledge upon which to base a consent?

In Finding VII the Court held that in the Fall of 1933 the deal was definitely off. Up to that time, by the testimony of all parties, no money had been expended, no work had been done on the mining claims covered by the lease, and whatever money may have been expended on the claims above those of the Appellants was not the money of N. P. Nelson, but the money of O. A. Nelson, who perpetrated this fraud upon Appellants and who dealt with N. P. Nelson as his laborer and partner and not as a trustee for Appellants, but in his individual capacity and for his own selfish purposes.

In 16 Cyc. 761, the established rule of equity under such circumstances is as follows:

> "If the owner, as soon as he is informed of the expenditures and improvements, protests against their continuance, and asserts his ownership to the property on which they are made, no estoppel arises."

Bringing themselves within the rule to avoid an estoppel, the Appellants as soon as they were informed that the deal was definitely off, in the Fall of 1933, posted notices, locked up their cabins, and protested against the continued exercise of control of their property. They went further. They brought this suit against N. P. Nelson to set aside the lease. It was after all this was done that the work was begun and the money expended upon the leased property. Appellants remained in possession of the property. N. P. Nelson broke the lock off a cabin in an attempt to take possession. Surely no estoppel can arise from such possession. Surely no estoppel can arise from such flagrant, wilful refusal to acknowledge the rights of an owner of property. (Tr. 112-118.)

What facts or circumstances, if any, gave rise to an estoppel? It is our contention that there were none. None of the elements are here present in order to invoke an estoppel.

There was no misrepresentation, no concealment of facts. James lived openly upon the property. He openly exercised ownership of it. When N. P. Nelson came upon the property in July of 1933, he believed that his deal with O. A. Nelson was going through, and, therefore, permitted him the use of a couple of cabins on the property. It is an unwritten law of

Alaska that mining cabins are the common property of all miners who seek shelter there. James would, therefore, have permitted Nelson to occupy these cabins in any event, and nobody knew that better than N. P. Nelson, an old miner, himself.

There was no color of fraud on the part of Appellants. None was pleaded and none was proved. Not even a hint at wrongdoing appeared during the course of the three-day trial. James was trying to pay his debts. He entered into negotiations with that end in view. That he, in so doing, fell into the clutches of a designing creditor who engineered his nefarious schemes until he obtained personal control of his property was not within his contemplation until the situation got far beyond his control by the Fall of 1933. He immediately set about to recover his property.

N. P. Nelson was, by every implication, an invisible partner in this whole scheme to defraud James. He, at all times, through his close relationship and dealings with O. A. Nelson, was in a better position to know the truth than was James, the victim of their machinations. N. P. Nelson was, therefore, not ignorant of the truth of the whole deal; and having knowledge, he could not have been induced to act to his detriment. Besides, he had nothing to lose. He was broke when he came to Chisana. O. A. Nelson put up the money, and it was he who took out the

gold recoveries. N. P. Nelson was merely his tool. There is an old axiom of equity which requires that he who comes into equity must come with clean hands; and that he who seeks equity must do equity. N. P. Nelson falters at the bar. His hands are tainted with the same overreaching and fraud as that of his mentor.

Rather, the doctrine of estoppel against estoppel should be applied in this case. For, N. P. Nelson held this lease from April 17, 1933, to June 30, 1933, without James' knowledge; and during all that time, and up to the open break in negotiations with O. A. Nelson in the Fall, he never mentioned his leasehold interest to James, though they saw each other from time to time. He held himself out as a laborer. He at all times had the superior knowledge. It was he who misled Appellants, he who remained silent when he should have spoken, he who concealed from James the fact of the lease and who withheld the true relationship between him and O. A. Nelson. Upon such a state of facts, the law will invoke an estoppel against him who seeks estoppel.

21 Corpus Juris 1139.

Branson v. Wirth, 17 Wall. 32, 21 U. S. (L. Ed.) 566.

10 R. C. L. Perm. Sup. 2764.

10 R. C. L. 841.

At the expense of repetition, the Court's attention is directed to the case of *New York Life Insurance Company v. Reese*, 19 Fed. (2d) 781, in which the Court holds, in a well reasoned decision upon a state of facts very similar to the case at bar, that the elements of estoppel of one clothing another with apparent power of disposition are misrepresentation, ignorance of the truth, and absence of equal means of knowledge.

> "The indisputable elements of estoppel of one clothing another with apparent title or power of disposition are:
>
> "(1)—Intentional or careless misrepresentations of known material facts inconsistent with subsequent claim;
>
> "(2)—Ignorance of the truth, and absence of equal means of knowledge of the party claiming estoppel;
>
> "(3)—Action by him induced by the misrepresentation; and
>
> "(4)—Injury to him, if the truth be proved."

Measured by these requirements, the elements of estoppel are wholly lacking. A review of the history of Appellants' dealings with O. A. Nelson and N. P. Nelson would serve no purpose. It has been plainly stated in the foregoing pages. Suffice it to say that James had no intent to misrepresent, there was no misrepresentation, and no charge of so doing has ever been raised against him; no damage was suffered by

N. P. Nelson as a result of any acts of Appellants, and the said N. P. Nelson at all times had superior knowledge or means of knowing the truth.

There remains a question to be disposed of, raised by Assignment of Error IV, the reasoning for which has been partially disposed of in the discussion of the doctrine of estoppel. Viewed by the circumstances surrounding the execution of the lease and the admissions of N. P. Nelson as to his status, it is plain to see that the lease itself was purely fictitious, and served the design of O. A. Nelson to place the James property quickly and effectively beyond his outward visible control until such time as he could mine out the gold and convert it to his own uses. If the lease has been bona fide, and for the purpose of getting recoveries sufficient to pay off the indebtedness to the Bank and the Chitina Cash Store, then the royalty of ten per cent gross was wholly inadequate to fuhnish sufficient returns to ever pay off the debt. The total debts involved in the negotiations amounted to about ten thousand dollars. (Tr. 123.) The lease being burdensome as to its terms on account of the inadequacy of the return, it should be set aside as contrary to public policy.

In Finding VII the Court found that there was no meeting of minds between the parties, and based up-

on that finding, it concluded (Tr. 173) that the Deed and Bill of Sale should be set aside and cancelled. At the same time, however, the Court concluded that O. A. Nelson acted as a trustee and agent for the Appellants in the execution of the lease to N. P. Nelson, made subsequently to the Deed. If the deed was void and of no effect, then the grantee could convey no estate under it, and, therefore, the Lease was void and of no effect. The Court's conclusions were inconsistent, and as such constituted reversible error.

CONCLUSION

From the foregoing discussion of the facts and the law, and based upon the apparent inconsistencies of the lower Court, this Court is asked to reverse the decree wherein it upholds the Lease from O. A. Nelson to N. P. Nelson, and that said Lease be set aside and held for naught; that Appellants be granted an accounting of all recoveries had under such void lease, that they be awarded their costs and disbursements and a reasonable attorneys' fee, and that they be granted such other and further relief as in quity and good conscience to which they may be entitled.

Respectfully submitted,

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